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No. 00-1168

IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM CO., ET AL.,
Petitioners,

v.

KEN WIWA, ET AL.,
Respondents.

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF CONGRESSMAN CHRISTOPHER H. SMITH, CONGRESSWOMAN ILEANA ROS-LEHTINEN, THE ANTI-DEFAMATION LEAGUE, THE CUBAN AMERICAN NATIONAL FOUNDATION, AND THE FOUNDATION FOR HUMAN RIGHTS IN CUBA IN SUPPORT OF RESPONDENTS KEN WIWA, ET AL.

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INTEREST OF *AMICI CURIAE*

Congressman Christopher H. Smith, Congresswoman Ileana Ros-Lehtinen, the Anti-Defamation League, the Cuban American National Foundation, and the Foundation for Human Rights in Cuba submit this brief *amici curiae* in support of Respondents Ken Wiwa, *et al.*[1]

Congressman Christopher H. Smith (Republican) represents New Jersey's Fourth Congressional District. Congressman Smith currently serves as the Chairman of the House Committee on Veterans' Affairs, the Vice Chairman of the House Committee on International Relations, and the Co-Chairman of the Congressional Commission on Security and Cooperation in Europe. Congressman Smith supported the passage of the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (*reprinted in* 28 U.S.C. § 1350) (the "TVPA"), and believes that both the TVPA and the Alien Tort Claims Act, 28 U.S.C. § 1350 (the "ATCA"), are constitutional and consistent with U.S. foreign policy goals, including the eradication of serious human rights violations.

Congresswoman Ileana Ros-Lehtinen (Republican) represents Florida's Eighteenth Congressional District. A political refugee from Cuba's Communist regime, Congresswoman Ros-Lehtinen is committed to the defense of human rights, religious freedoms, and the

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[1] Letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Counsel for the parties did not author this brief in whole or in part. No person or entity, other than the *amici* named above, their members or their counsel, made a monetary contribution to the preparation and submission of this brief.

promotion of democracy, supporting legislative initiatives which further these goals throughout the world. Congresswoman Ros-Lehtinen currently serves as Chairman of the House Subcommittee on International Operations and Human Rights and as Vice-Chairman of the Subcommittee on Western Hemisphere of the House Committee on International Relations. From 1995-1997, she served as Chairman of the Subcommittee on Africa during which time she condemned the execution of Ken Saro Wiwa and other human rights violations in Nigeria. She supported the passage of the TVPA and believes that both the TVPA and the ATCA are constitutional and consistent with U.S. foreign policy goals.

The Anti-Defamation League (the "ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's mission to combat all types of prejudice, discriminatory treatment and hate. ADL has devoted its energies and its resources to securing and safeguarding human rights for all minorities, and has spoken out consistently against abuses of fundamental rights in the United States and overseas. This case is of particular importance to the ADL because it could impact the ability of aliens who are victims of religious, racial or ethnicity-based persecution to bring claims in U.S. courts alleging violations of the ATCA.

The Cuban American National Foundation (the "CANF") is an independent, non-profit organization dedicated to the re-establishment of freedom and democracy in Cuba. The Foundation for Human Rights in Cuba (the "FHRC") is a private, non-profit organization dedicated to defending the basic human rights of the people of Cuba, truthfully and accurately monitoring human rights violations in Cuba, and promoting and developing a culture of respect for the

dignity of the human being independent of political beliefs. The CANF and the FHRC have a strong interest in this case because of their dedication to the principle of respect for human rights and their concern regarding the repression of and human rights violations suffered by the people of Cuba.

SUMMARY OF ARGUMENT

By way of Question 4 of their petition for writ of certiorari, Petitioners Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, P.L.C., ask this Court to use this case as a vehicle for overturning a different case decided more than twenty years ago, *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which interpreted the ATCA. Unable to point to any true disuniformity in the law, Petitioners suggest a "parade of horribles" -- disastrous foreign policy implications and an "explosion" of litigation -- that they suggest has followed or will follow *Filártiga*. But, as will be demonstrated, Petitioners' rather hysterical predictions are based upon a fundamental misunderstanding of *Filártiga*'s scope. That case, in fact, permits federal court jurisdiction over only a very narrow class of cases, namely, those that allege violations of well-established and accepted international norms of conduct. Courts reviewing ATCA claims that, in their view, are based upon novel or controversial theories of international law, have had no difficulties rejecting jurisdiction over those claims. Indeed, since *Filártiga*, the federal courts have permitted only a small number of cases to proceed under the ATCA, and those cases have alleged only the most serious types of human rights abuses -- officially sanctioned torture, extra-judicial killings and "disappearances," and prolonged aribitrary jailings -- that all civilized nations universally condemn.

Filártiga and its progeny are fully in line with the well-established foreign policy of the United States, which favors the protection of individual rights, and

which obviously denounces the types of serious human rights abuses that are subject to redress under the ATCA. Indeed, Congress approved of *Filártiga*, and codified its specific holding, in the TVPA. Thus, not only has *Filártiga* met with essentially unbroken approval within the courts, but it also has been fully accepted by Congress as a salutory decision that *correctly* interpreted the ATCA. Accordingly, a review of the *Filártiga* decision in the context of this case would neither promote uniformity of the law nor serve any legitimate policy purpose.

For these reasons, *amici* urge the Court to deny the petition for certiorari with respect to Question 4.

ARGUMENT

I. The Jurisdiction Of The Federal Courts Under The ATCA, As Interpreted In *Filártiga*, Is Narrow, Can Only Be Invoked For Redress Of The Most Universally Recognized Violations Of International Law, And Has None Of The Pernicous Effects Attributed To It By Petitioners

Contrary to Petitioners' implicit suggestions, *Filártiga* was not intended, and has not been used, as a tool for litigants to assert novel or untested theories of international law. Rather, the decision itself makes clear that only a narrow class of cases -- those alleging violations of uncontroversial international norms of conduct accepted by all civilized nations -- fall within the jurisdiction conferred by the ATCA. And the decision also makes clear that mere allegations are insufficient to establish ATCA jurisdiction; rather, a court faced with an ATCA claim must make an independent inquiry into the well-recognized sources of international law before concluding that the alleged tortious conduct does, in fact, violate such a well-established norm, and, thus, that the court has jurisdiction. Accordingly, contrary to Petitioners' assertions, *Filártiga* and its progeny represent neither a

vast expansion of federal court jurisdiction, nor a threat to any of this Nation's legitimate foreign policy concerns.

The plaintiffs in *Filártiga*, citizens of Paraguay, alleged that the defendant, at a time when he was a high-ranking police officer in Paraguay, kidnapped and then tortured to death a member of their family as retribution for their political opposition to the ruling government. 630 F.2d at 878.[2] Plaintiffs alleged that this conduct -- causing death through "deliberate torture perpetrated under color of official authority," *id.* at 878 -- constituted the tort of wrongful death, and was "committed in violation of the law of nations" within the meaning of the ATCA, 28 U.S.C. § 1350.

Given the particularly heinous conduct alleged, the court in *Filártiga* might well have concluded, with little analysis, that such "official torture" was indeed a "violation of the law of nations." But the court did not do so, choosing instead to engage in a rigorous and painstaking analysis of the question. The court held that a plaintiff alleging ATCA jurisdiction must demonstrate that he or she is alleging a violation of "'a settled rule of international law'" recognized by "'the general assent of civilized nations.'" 630 F.2d at 881 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)). The court recognized that "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one," *id.*, and specifically interpreted the ATCA "*not* as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights *already recognized by international law*." *Id.* at 887 (emphasis added). Thus,

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[2] The defendant, some time later, sold his house in Paraguay and entered the United States, where he was served with plaintiffs' complaint, thereby establishing personal jurisdiction. *Id.* at 878-79.

the formulation of ATCA jurisdiction in *Filártiga* is quite narrow, and is limited to claimed violations of norms that are accepted by all civilized nations, including, of course, the United States.

The court in *Filártiga* made clear that federal court jurisdiction under the ATCA is *not* established merely by a plaintiff's *allegations* of a "settled rule" of international law. The court specifically differentiated between the "well pleaded complaint" analysis typical under 28 U.S.C. § 1331 and the analysis necessary under the ATCA, which requires courts to "engage[] in a more searching preliminary review of the merits. . . ." 630 F.2d at 887-88.

Indeed, in the *Filártiga* decision itself, the court demonstrated this type of analysis. In making the jurisdictional determination, the court did not rely upon plaintiffs' allegations concerning the state of international law. Rather, it looked to "the sources from which customary international law is derived," such as "the usage of nations, judicial opinions and the works of jurists. . . ." *Id.* at 884; *see also id.* at 880 ("The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'") (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).[3] Only upon a painstaking review of these sources (as well as unrebutted affidavits of legal scholars submitted by the plaintiffs), and only upon finding "no dissent" on the issue, *id.* at 882, did the court finally conclude that the tort being alleged -- "deliberate torture perpetrated under color of official

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[3] That method of determing the existence and scope of customary international law is well-established and well-accepted. *See* Restatement (Third) of the Foreign Relations Law of the United States § 103(2) (1986).

authority," *id.* at 878 -- was indeed one "in violation of the law of nations."

Thus, properly understood, *Filártiga* gives federal district courts little discretion to entertain claims based upon novel or controversial theories of international law. Rather, a plaintiff who seeks to rely upon the ATCA must demonstrate to the court's satisfaction that he or she is, indeed, alleging a violation of "the law of nations," a term limited to settled rules to which all civilized nations give their assent.

Indeed, since *Filártiga*, the federal courts have been rigorous in limiting the ATCA's reach to "'well-established, universally recognized norms of international law . . . as opposed to idiosyncractic legal rules.'" *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) quoting *Filártiga*, 630 F.2d at 881, 888. Post-*Filártiga* ATCA jurisprudence has been described as permitting federal court jurisdiction only where: (1) a recognizable, universal norm of prohibition exists; (2) sufficient criteria exist to determine whether a given action amounts to the prohibited act and thus violates the norm; and (3) the prohibition is obligatory. *See, e.g., Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997) (citations omitted), *aff'd*, 197 F.3d 161 (5th Cir. 1999); *see also* Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 495 (1997) (noting that juridically cognizable customary international law must be universal, definable, and obligatory). And the courts have remained loyal to that strict and narrow formulation in determining their own jurisdiction under the ATCA. *See, e.g., Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166 (5th Cir. 1999) (ATCA "'applies only to shockingly egregious violations of universally recognized principles of international law'") *quoting Zapata v. Quinn*, 707 F.2d 691, 692 (2d. Cir. 1983) (*per curiam*); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3,

7 (D.D.C. 1998) (law of nations is "formed by the 'general assent of civilized nations'") (quoting *Filártiga*, 630 F.2d at 880); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (norms of international law must be "universal, definable and obligatory").

Petitioners' arguments about the allegedly pernicious effects of *Filártiga*, therefore, are substantially overblown, if not entirely baseless. For example, Petitioners argue that *Filártiga* has led to the "opening of the federal courts to a large class of jurisdictionally questionable lawsuits" that will have "foreign policy consequences" including "the risk of reciprocal action against U.S. entities in foreign courts." Pet. at 4. Petitioners, of course, point to no example of such dire "consequences," even though *Filártiga* has been the well-accepted law throughout the Nation for more than twenty years.

This lack of examples is hardly surprising, given that *Filártiga* itself only permits federal court jurisdiction over suits alleging violations of international norms that are *not* controversial and that civilized nations (including, of course, the United States) *readily accept*. While a foreign nation might well object to the assertion of jurisdiction over one of its citizens, that is an issue of *personal* jurisdiction, one that can arise in *any* case against a foreign national, and one that is in no way unique to lawsuits brought under the ATCA. Indeed, because ATCA claims must be based upon alleged violations of norms that, by definition, must be accepted by all civilized nations, claims under the ATCA are actually far *less* likely to cause offense to foreign nations than claims brought under purely domestic laws. Thus, contrary to Petitioners' contention, there is nothing inherent in the ATCA, or in *Filártiga*'s interpretation of that statute, that is likely to have (or that has had) any adverse "foreign policy consequences."

Petitioners also assert that, as a result of *Filártiga*, "[t]he federal courts have already seen an explosion of international law litigation with highly attenuated connections to the United States." Pet. at 4. That too is both undocumented and untrue. Petitioners, as evidence of this "explosion," cite to a total of *six* cases brought in the twenty years since *Filártiga*. And regardless of the number of cases actually *filed* that *allege* ATCA jurisdiction, the federal courts have had little difficulty in limiting the number and types of cases over which they *accept* such jurisdiction. Consistent with the stringent limitations set forth in *Filártiga* itself, courts have found that claims asserting official torture, summary execution, causing the disappearance of persons, and prolonged arbitrary detentions are cognizable under the ATCA, but that claims asserting impairment of free speech, negligence, fraud, price fixing and environmental torts are not.[4] This

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[4] *Compare Kadic v. Karadzic*, 70 F.3d at 241-42 (genocide actionable); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (unpaid forced labor actionable): *Islamic Salvation Front*, 993 F. Supp. at 3 (hijacking, summary execution, rape, mutilation, sexual slavery and murder actionable); *Jama v. United States Immigration & Naturalization Serv.*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998) (cruel, unhuman and degrading treatment actionable); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (prolonged arbitrary detention in inhumane conditions actionable); *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (official torture and cruel, inhuman and degrading treatment actionable); *and Xuncax*, 886 F. Supp. at 184-87 (torture, summary execution, disappearance, arbitrary detention, and certain cruel, inhuman and degrading treatment actionable); *with Kruman v. Christie's Int'l, PLC*, No. 00Civ.6322 (LAK), 2001 WL 77059, at *5 (S.D.N.Y. Jan. 30, 2001) (price fixing not

[Footnote continued on next page]

demarcation illustrates that courts have acted conservatively and with no hint of illegitimate "activism," in determining whether an alleged offense is within their jurisdiction under the ATCA.[5]

II. The ATCA, As Interpreted By *Filártiga*, Furthers The Strong -- And Congressionally Recognized -- Policy Interests Of The United States In Providing A Forum To Victims Of Universally Condemned Human Rights Violations

Lawsuits enforcing globally recognized norms of human rights promote U.S. policy regarding the protection of the rights of individuals. Judicial decisions denouncing genocide, extrajudicial killings, and "disappearances" bolster, and certainly in no way contradict, U.S. foreign policy. Decisions under the ATCA -- indeed, the very existence of ATCA

[Footnote continued from previous page]

actionable); *Beanal*, 197 F.3d at 167 (environmental torts not actionable); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (fraud, breach of fiduciary duty, or misappropriation of funds not actionable); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670-71 (S.D.N.Y. 1991) (shipping hazardous wastes not actionable); *and Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (free speech violations not actionable).

[5] Furthermore, not surprisingly, courts have shown no reluctance to dispose of ATCA claims on other grounds, where those claims failed as a legal or factual matter. *See, e.g., Beanal*, 197 F.3d at 161 (plaintiffs did not state justiciable violations of the law of nations); *Doe v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (defendants' summary judgment motion granted); *Iwanowa*, 67 F. Supp. 2d at 424 (dismissal on, *inter alia*, statute of limitations grounds).

jurisdiction -- serves the useful function of discouraging "rogue" state actors, or unscrupulous and sadistic dictators, from ignoring international treaties and universally accepted norms of international law. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2397-98 (1991). By permitting appropriate lawsuits to proceed under the ATCA, *Filártiga* vindicates the important vision of the United States as a nation at the forefront of efforts both to strengthen the rule of law and to protect universally recognized human rights. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM J. INT'L L. 461, 493 (1989).[6]

That *Filártiga* is in line with, and not the least bit contrary to, well-established U.S. foreign policy has been specifically recognized by Congress. Congress affirmed its support for the ATCA and *Filártiga* by enacting the TVPA as a supplement to, but *not* a replacement of, the ATCA. The TVPA codified the right of an alien to maintain a cause of action in federal court for official "torture" or "extrajudicial killings," 28 U.S.C. § 1350, a right that, as recognized by *Filártiga*,

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[6] The ATCA also promotes salutory social goals on an individual level by creating a mechanism for dispute resolution and furthering the classic tort goals of compensation, deterrence and punishment. In many cases involving human rights violations, merely finding a hospitable forum can be difficult, if not impossible, for the victim. Bringing the lawsuit in the country where the tort occurred may be untenable. If the victim has managed to flee the country, he or she is unlikely to be willing to return to pursue a lawsuit. Thus, by providing a forum in which such lawsuits can be heard, the ATCA serves a commendable humanitarian purpose. *See generally* Koh, *supra*, 100 YALE L.J. at 2397-98.

aliens already possessed under the ATCA.[7] While Congress understood that aliens already had a remedy for such offenses under the ATCA, as stated in the Reports of the Senate and House of Representatives, Congress intended the TVPA to "establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)." H.R. REP. NO. 102-367 (I), at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86; S. REP. NO. 102-249, 1991 WL 258662 (Nov. 26, 1991).

The House and Senate Reports also make clear that Congress did not intend the TVPA to replace the ATCA. Rather, Congress believed that official torture and extrajudicial killings merited "special attention" and, thus, codified those causes of action under the TVPA. The Reports observe, however, that "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered [by] section 1350." H.R. REP. NO. 102-367 at 4; see also S. REP. NO. 102-249 at 1991 WL 258662; *see also Beanal*, 969 F. Supp. at 380.

Through the enactment of the TVPA, Congress issued an express ratification of *Filártiga* and its progeny, affirmatively sanctioning the incorporation of customary international human rights law into federal common law. While the ATCA focuses on the grant of jurisdiction to the district courts, the TVPA imposes liability under U.S. law on entities which, under color of the law of any foreign nation, subject an alien (or U.S. citizen) to torture or "extra judicial killing." 28 U.S.C. § 1350. The TVPA thus recognized that the law of nations is incorporated into the law of the United States and that a violation of the international law of human

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[7] The TVPA also extends this right to citizens of the United States.

rights is a violation of U.S. domestic law. *See* H.R. REP. NO. 102-367 at 4.

The legislative history of the TVPA further evidences Congress' approval of *Filártiga*. The House and Senate Reports discuss the *Filártiga* decision, noting that it "met with general approval." H.R. REP. NO. 102-367 at 4; *see also* S. REP. NO. 102-249 at 1991 WL 258862. The House and Senate further affirmed Congress' support for the *Filártiga* rationale by expressly rejecting a concern previously raised by Judge Bork in a concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). In that concurring opinion, Judge Bork questioned the existence of a private right of action under the ATCA without express authorization from the legislative branch. *Tel-Oren*, 726 F.2d at 799. In the House and Senate Reports, however, Congress made clear its intention that courts continue to use the ATCA to incorporate international human rights law as part of federal common law in lawsuits involving a broader range of causes of action than those covered by the TVPA. As emphasized in the House Report, Section 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." H.R. REP. NO. 102-367 at 4; *see also* S. REP. NO. 102-249 at 1991 WL 258862; *see also* Goodman & Jinks, *supra*, 66 FORDHAM L. REV. at 513-14.[8]

In short, *Filártiga* not only spawned judicial progeny, but also has been specifically considered and approved by Congress. The principles embodied in *Filártiga* -- the recognition of global norms of international law, and the need for redress for victims of

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[8] *See also* H.R. REP. NO. 102-367 at 3, observing that "Section 1350 has other important uses and should not be replaced."

violations of those norms -- are a central and proud aspect of U.S. foreign and domestic policy, and have been since the ATCA was enacted by the First Congress. *Filártiga*'s interpretation of the ATCA has been accepted by every binding decision of every court that has considered the issue, and has been approved by Congress. There is neither disuniformity in the law, nor any legitimate policy reason to consider overturning this uniform precedent. Accordingly, no purpose would be served by granting the petition with respect to Question 4.

CONCLUSION

The Court should deny the petition for writ of certiorari with respect to Question 4.

Respectfully submitted.

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